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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM L. LUKHARD, COMMISSIONER,
VIRGINIA DEPARTMENT OF SOCIAL SERVICES,
Petitioner,

v.

ONA MAE REED, SALLIE LONG, RUTH WILCHER,
OPAL MAE COOK, STELLA KING, AND ALL
OTHERS SIMILARLY SITUATED,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF *AMICUS CURIAE* OF LEGAL SERVICES OF NORTH CAROLINA ON BEHALF OF ITS CLIENTS IN SUPPORT OF RESPONDENTS ONA MAE REED *ET AL.*

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STATEMENT OF INTEREST

Amicus, Legal Services of North Carolina (LSNC) including two of its affiliate programs, is deeply and intimately concerned about the outcome of this case. LSNC files this brief on behalf of its clients. Two affiliate programs of LSNC currently represent AFDC recipients in an action filed against the North Carolina Department of Human Resources and the United States Department of

Health and Human Services, *Finch v. Kirk*, No. 86-90-CIV-5 (E.D.N.C. Jan 21, 1986), challenging state and federal regulations that treat personal injury awards as "income" rather than as "resources" in determining AFDC eligibility. Class certification is pending in that action.

LSNC is a statewide program responsible for civil representation of low income persons in eighty-three of North Carolina's one hundred counties. Overall, 1.3 million persons in North Carolina are governmentally defined as eligible for legal services. Generally, to be eligible, a family's annual gross income must be less than 125% of the federal poverty line. Legal Services programs in North Carolina receive more than 35,000 requests for assistance from eligible, low income persons each year and provide service to approximately 25,000 of these persons. In North Carolina, 180,000 people receive AFDC benefits. Many of these AFDC recipients rely upon LSNC to protect their interest in continued financial assistance when eligibility criteria are met.

AFDC regulations provide that, when a member of an AFDC household receives non-recurring "lump sum" income, a period of ineligibility is imposed during which AFDC benefits are denied to the entire family. The set period of ineligibility continues even though the lump sum may be exhausted, leaving the family in desperate need of AFDC benefits to meet the basic costs of survival. Although the United States Court of Appeals for the Fourth Circuit held in *Reed v. Lukhard*, 774 F.2d 1270 (4th Cir. 1985), *aff'g* 591 F. Supp. 1247 (W.D. Va. 1984) that "the lump sum rule may not be applied to personal injury awards to render AFDC recipients ineligible for benefits," the State of North Carolina continues to deny, reduce, or terminate AFDC benefits on this basis, thereby depriving many low income families of resources desperately needed for survival.

In the *Finch* action filed by LSNC, plaintiff Finch alleged that she and her minor child were receiving AFDC benefits of $176 per month in June, 1985. She received her monthly AFDC check on June 1, 1985 and spent the check for monthly expenses. On June 4, 1985, Ms. Finch received a $1,200 lump sum insurance settlement for bodily injury sustained in an automobile accident on September 15, 1984. Ms. Finch used part of the money to repay outstanding loans and bills. She also spent her award for transportation expenses, clothing and a few inexpensive toys for her child, and non-Food Stamp items such as cleaning supplies.

Ms. Finch promptly reported the personal injury award to Social Services. Social Services then determined she would be ineligible for June, July and August, 1985 AFDC benefits. It found she would be eligible for partial benefits in September, 1985. However, before termination of her benefits, she had expended her award. During the time that Ms. Finch's AFDC benefits were terminated, she had to pawn part of her furniture in order to meet her living and medical expenses for July and August, 1985.

Upon appeal, the State Department of Human Resources affirmed the termination of her AFDC benefits. It concluded as a matter of law that personal injury awards are income rather than resource and thus are subject to the lump-sum rule.

Plaintiff Hardy and her two minor children were receiving AFDC benefits of $246 per month in November, 1985. The AFDC benefits constituted the family's only source of income aside from $50 per month in support payments from the children's father. Ms. Hardy received her monthly AFDC check on November 1, 1985 and spent the check for monthly expenses. On November 25, 1985, she received a $1,783 lump sum insurance settlement for bodily injury sustained in an automobile accident on

May 22, 1985. She had received medical treatment for her injuries from May through October, 1985.

Ms. Hardy received notice in January 1986, that pursuant to North Carolina's lump-sum policies, her AFDC grant would be reduced from $246 to $184, representing partial benefits for March, 1986. Additionally, a period of recoupment, at a minimum of 10% of the monthly grant, or $24 per month, for approximately the next 40 months, would follow until the AFDC benefits provided to Ms. Hardy for November and December, 1985, and January and February, 1986 were fully reimbursed. The County determined she was ineligible during these months.

Prior to receiving this notice of ineligibility and the 40 month recoupment, Ms. Hardy had completely expended the personal injury award. In November, 1985, Ms. Hardy's mother, who is disabled, received an eviction notice from her landlord. Ms. Hardy spent substantial portions of her personal injury award on moving expenses for her mother and her family. Ms. Hardy later moved into her mother's apartment with her children to reduce family expenses. Approximately $300 of the money was spent on the purchase of groceries during November and December, 1985 for the combined households. Part of the money was also spent on the repayment of an outstanding loan to her grandmother. Another portion of the funds was spent on the purchase of necessary items and basic living expenses such as winter clothing for herself and her children. By December, 1985, the entire insurance settlement had been exhausted, leaving no money to pay the winter's heating and utility bills or non-food items such as soap, detergent and toilet articles.

Plaintiff Little and her minor child were receiving AFDC benefits of $214 per month in 1985. She received her monthly AFDC checks in December, 1985 and January, 1986, and spent the checks for monthly ex-

penses. On December 4, 1985, she received a $749 lump sum settlement for bodily injury sustained in a slip and fall accident at a grocery store on August 15, 1984.

After reporting her personal injury award to Social Services, she was informed by written notice dated December 17, 1985, that she was ineligible to receive the December, 1985 and January, 1986 AFDC checks. She appealed this decision and the original decision of ineligibility was upheld whereby the AFDC benefits for those two months were ordered recouped. Ms. Little is dependent on the continued receipt of her AFDC payments in order to meet her needs and those of her minor child.

In each of the above situations, the imposition of the lump sum rule resulted in harsh inequities to the families involved. An adverse decision in this case would leave these families and many other families who receive personal injury awards without the means to obtain food, clothing and shelter. A principle interest of *Amicus* is the protection and preservation of the court decision below to ensure that needy children and their families can receive financial assistance.

The Secretary of the United States Department of Health and Human Services has issued a new regulation which purports to treat all lump sum payments, including "windfalls" (which would include personal injury awards), as "income" to be counted under the lump sum rule. 52 Fed. Reg. 9191, 96 (March 18, 1986) (to be codified at 45 C.F.R. § 233.20(a)(3)(ii)(F)). The Secretary has filed a Brief as Respondent Supporting Petitioner in which he argues that the March 18, 1986 final regulation is dispositive of the entire issue and requires reversal of the decision below. The State of North Carolina has joined in an *amicus* brief with seven other states in support of petitioner's position. Therefore, LSNC's interest in this case is considerable and justified.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus, Legal Services of North Carolina on behalf of its clients, urges affirmance of the judgment of the United States Court of Appeals for the Fourth Circuit. Petitioner argues that the opinion of the United States Court of Appeals for the Seventh Circuit in *Watkins v. Blinzinger*, 789 F.2d 474 (7th Cir. 1986), *aff'g* 610 F. Supp. 1443 (S.D.Ind. 1985), best construes the AFDC statute and furthers legislative intent. Respondents and *Amicus*, however, strongly urge the Court to hold that the purpose of the AFDC statute and Congressional intent support the exclusion of personal injury awards from the definition of "income."

Amicus argues (Point I) that, given the legislative history and clearly established rules of statutory construction, Congressional intent dictates the exclusion of personal injury awards from the term "income" under the lump sum rule. Since Congress did not indicate that it intended to use a definition of "income" that is broader than the traditional legal definition, it is clear that Congress did not intend to include personal injury awards as "income" under the AFDC statute. *Amicus* further argues (Point II) that the Court should not give deference to the Secretary's interpretation of the lump sum rule, because it is inconsistent with Congressional intent and his own prior pronouncements, and defeats the very purpose of the AFDC Act. Therefore, the judgment below should be affirmed.

ARGUMENT

I. CONGRESS INTENDED THE EXCLUSION OF PERSONAL INJURY AWARDS FROM THE DEFINITION OF INCOME IN THE AFDC STATUTE.

The Court of Appeals for the Fourth Circuit correctly determined that personal injury awards must be excluded from the definition of "income" in the AFDC statute. The Fourth Circuit carefully analyzed the "lump sum" rule of the Omnibus Budget Reconciliation Act of 1981 (OBRA) in making its determination. Congress passed the lump sum rule to encourage AFDC recipients to budget large payments of income to meet ongoing needs of their households.

Before 1981, 42 U.S.C. § 602(a)(7) stated that ". . . the State agency shall in determining need take into consideration any other income and resources. . . ." When Congress implemented OBRA, it did not alter its language. Rather, Congress changed the *method* by which income would be counted. Under pre-1981 law, "[any] payments that [met] the definition of income . . . [were] counted as income in the month of receipt and any of the payment that [was] not spent in that month [was] usually considered as a resource in the months thereafter." In the 1981 Act, "income received in a month [would] be considered available as income in the month it is received and also in future months." S. Rep. No. 139, 97th Cong., 1st Sess. 505, *reprinted in* 1981 U.S. Code & Ad. News, 396, 702, 771. *See also* 42 U.S.C. § 602(a)(17) (before and after OBRA).

The court below correctly reasoned that the 1981 amendment changed the treatment of income, but did not change the definition of income. In fact, it found that OBRA did not even define "income." In the absence of a definition of income, the court concluded that Congress intended to include as income only those large payments of money that would ordinarily be considered in-

come. *Reed*, 774 F.2d at 1274-75. This Court set forth that principle when it stated that "deference to the supremacy of the legislature, as well as recognition that congressmen typically vote on the language of a bill, generally require[s] us to assume that 'the legislative purpose is expressed by the ordinary meaning of the words used.'" *United States v. Locke*, 105 S.Ct. 1785, 1793 (1985) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)).

Based on the ordinary meaning of the term "income," personal injury awards should not be included as income under the lump sum rule. As this Court determined, "[w]here Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, *unless the statute otherwise dictates*, that Congress means to incorporate the established meaning of these terms." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981) (emphasis added).

The term "income" has accumulated settled meaning. "Income" represents a "gain or profit," 42 C.J.S. Income § 531 (1944), and is ordinarily understood to be a return on the investment of labor or capital, thereby increasing the wealth of the recipient. *See Blacks Law Dictionary* 687 (5th ed. 1979). See also *Eisner v. Macomber*, 252 U.S. 189, 207 (1919).

On the other hand, "[p]ersonal injury awards serve to make one whole, in effect, restoring one to the status quo before the injury was suffered." *See Bowen v. Fidelity Banks*, 209 N.C. 140, 183 S.E. 266 (1936); *Carolina Power and Light Company v. Paul*, 261 N.C. 710, 136 S.E. 2d 103 (1964); 25 C.J.S. Damages § 17 (1966). "The damages award is substitutionary relief, that is, it gives the plaintiff money mainly by way of compensation, to make up for some loss that was not, originally, a money loss, but one that ordinarily may be measured in money." *D. Dobbs, Remedies* § 3.1 (1973). *See also* 25

C.J.S. Damages § 17; *Black's Law Dictionary* 352 (5th ed. 1979). Hence, personal injury awards do not represent a return on investment of labor or capital. *See also* The Internal Revenue Code, 26 U.S.C. § 104 which states that gross income does *not* include "the amount of any damages received . . . on account of personal injuries or sickness." Rather, as the Fourth Circuit found, personal injury awards replace losses due to pain and suffering. *See Reed*, 774 F.2d at 1275.

Congress was well aware of the common meaning of "income" when it redrafted 42 U.S.C. § 602(a)(7) and (17). If Congress had intended to radically change the definition of "income" to include damages in such a way as to be repugnant to 200 years of American law, it would have clearly so stated.

In total contradiction to these established principles, the Secretary argues that the term "income" refers to the gross receipts an AFDC family has available to meet its monthly needs. The Secretary relies upon *Heckler v. Turner*, 105 S.Ct. 1138 (1985) to support his theory that the gross receipts available to an AFDC family for support are income. Significantly, *Heckler v. Turner* did not address personal injury awards. Rather, the opinion centers on mandatory tax withholdings from wages or salary. Unlike personal injury awards, mandatory tax withholdings represent wages and fall within the ordinary meaning of "income." The Secretary's reading of *Heckler v. Turner* is overly broad. The case cannot be cited for the proposition that personal injury awards come within the purview of term "income." With his misplaced reliance on *Heckler v. Turner*, the Secretary, in effect, seeks to overturn a whole body of tort law. When he implemented his expansive definition of "income," the Secretary substantially rewrote the statute in disregard of Congressional intent. These actions are clearly arbitrary, capricious and repugnant to a whole body of American jurisprudence.

Not only does the Secretary's contrived definition of income contradict Congressional intent, but it also frustrates the very policy that Congress sought to implement. The situation the Secretary envisions is far removed from the financial realities confronting many AFDC families. The Secretary blinks at reality and blatantly ignores the fact that often personal injury victims sustain injuries that result in physical and mental impairments extending beyond the receipt of the personal injury award. Although the Secretary discounts prior medical expenses in determining a disqualification period, he fails to recognize the frequent existence of future expenses relating to the injury. Contrary to the Secretary's assumption, the personal injury award may not be available to meet the ongoing needs of the AFDC family. When additional expenses arise, the disqualified AFDC household is often forced to use its personal injury award to seek proper medical care, leaving no money for food, shelter and other survival needs of the family.

The Secretary correctly points out that Congress intended for AFDC benefits to be provided only to needy families. *See Shea v. Vialpando*, 416 U.S. 251 (1974). He then argues that the most sensible reconcilation of the concepts of "income" and "resources" is ". . . one that best encourages a family to budget its income and resources to take care of itself. . . . [T]he Secretary's treatment of personal injury . . . awards gives the statutory language its congressionally intended effect." *See* Brief for the Secretary of Health and Human Services as Respondent Supporting Petitioner at 13. However, his new regulation utterly fails to achieve this Congressional purpose. Not only does the Secretary refuse to recognize the ordinary meaning of "income," but he denies AFDC recipients the opportunity to budget their personal injury awards for future expenses.

For example, in the class action pending in North Carolina, one plaintiff alleged she was forced during her

period of disqualification to pawn part of her furniture, and to sleep on the floor with her minor child, in order to purchase food for her child and to obtain medical care for herself. *See* p. 3, *supra*. Hence, circumstances beyond her control dictated that she could not budget her personal injury award as "income" in the manner the Secretary contemplates. In this case and many similar cases, in addition to thwarting the Congressional purpose of encouraging budgeting by the AFDC recipient, the application of state and federal regulations purporting to interpret the lump sum rule utterly defeats the purpose of the AFDC statute which is to assist needy families.

Both the Secretary's regulation and his interpretation of the statute ignore the ordinary meaning of the term "income," thereby imposing harsh inequities upon needy parents and their children. Congress intended that personal injury awards be excluded from the definition of income in the AFDC statute. In order to fulfill the Congressional intent to encourage budgeting and to assist the needy, Health and Human Services' new regulation must be declared invalid. Only by affirming the decision in *Reed* will these families be afforded the means to meet their basic needs of survival as Congress intended.

II. THE SECRETARY'S INTERPRETATION OF THE OBRA LUMP SUM AMENDMENT IS NOT ENTITLED TO DEFERENCE.

The Secretary of Health and Human Services, by enacting 45 C.F.R. § 223.20(a)(3)(ii)(F), has impermissibly rewritten the OBRA lump sum statute. He now asks the Court to legitimate his nonconformance with Congressional intent by holding that his interpretation of the OBRA lump sum rule is "reasonable" and, as such, is entitled to deference. The Secretary's interpretation of OBRA as expressed in his new regulation and in his brief is not entitled to deference since his interpretation is inconsistent with Congressional intent and his own prior

pronouncements, and defeats the very purpose of the AFDC Act.

Although it is true that the Secretary's interpretation of the Social Security Act would be entitled to deference, this deference does not abrogate the Court's duty to interpret the Act in a manner consistent with Congressional intent. Federal courts, not administrative agencies are the final arbiters of statutory construction. This Court has held that " 'deference owed to [agency interpretation of statutes they are empowered to administer] cannot be allowed to slip into judicial inertia which result in the unauthorized assumption by an agency of major policy decisions properly made by Congress.' " *Bureau of Alcohol, Tobacco and Fire Arms v. Federal Labor Relations Authority*, 104 S.Ct. 439, 444 (1983) (quoting *American Shipbuilding Co. v. NLRB*, 380 U.S. 300, 318 (1965)). This Court further mandates that courts must not rubber-stamp administrative decisions; rather, they must insure that these decisions are consistent with the statutory mandate and do not frustrate Congressional policy underlying the statute. 104 S.Ct. at 444.

Ordinarily, administrative interpretations of statutory terms are given important—but *not controlling*—significance. *Batterton v. Francis*, 432 U.S. 416 (1977). However, deference that the Secretary seeks is constrained by this Court's "obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history." *Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979) (quoting *Teamsters v. Daniel*, 439 U.S. 551, 566 (1979)).

The obvious inconsistency of the new lump sum regulation with Congressional intent can readily be seen from the legislative history of OBRA. When it revised 42 U.S.C. § 602(a)(17), Congress did not expand, constrict or otherwise alter the definition of "income." *See* p. 7, *supra*. The language of the lump sum rule and the history surrounding it in no way suggest that Congress

intended to change anything other than the *treatment* of lump sum "income."

The weight afforded to agency interpretative regulations "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, *its consistency with earlier and later pronouncements*, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (emphasis added). *See also St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 783, n. 13 (1981); K. Davis, *Administrative Law*, § 5.03 (3rd Ed. 1972). In this case, there has been a gross lack of consistency by the Secretary interpretating the OBRA lump sum rule. Previously, but long after enactment of OBRA, the Secretary had propounded the policy of treating as "resource," not "income," damage to a "resource" such as a car. (J.A. 46-47) Now, with the enactment of the *final* regulation 45 C.F.R. § 223.20(a)(3)(ii)(F), the Secretary requires states to treat resource damage awards as "income" and to be counted under the lump sum rule. Brief for the Secretary of Health and Human Services as Respondent Supporting Petitioner at 19.

Furthermore, the Secretary previously permitted the states to treat personal injury awards as either "income" or "resource." (J.A. 62) Then, while cases on this issue were pending throughout the country, the Secretary issued proposed new regulations which would require all states to treat all "windfalls" as "income" under the lump sum rule. 49 Fed. Reg. 45558 (November 14, 1984). No mention of personal injury awards was made in his definition of "windfall." However, when the final regulation was issued—after a Third Circuit decision unfavorable to the Secretary's position and while this case was pending before this Court on petition for a writ of *certiorari*—the Secretary specifically included personal injury awards in the definition of "income." 50 Fed. Reg. 9205 (March 18, 1986) (to be codified at 45 C.F.R. § 233.20(a)(3)(ii)(F).

Not only has the Secretary vacillated in his rulings, but he has conveniently contrived new versions of the lump sum rule to meet the objections raised in the various court cases. This type of blatant manipulation of agency regulation by the Secretary is not entitled to deference.

Under the Secretary's interpretation of OBRA, Congressional intent is badly frustrated. The AFDC program was created to encourage "the care of dependent children in their own homes . . . by enabling each State to furnish financial assistance . . . to needy depending children . . . to help maintain and strengthen family, life and . . . maximum self support. . . ." 42 U.S.C. § 601. Yet, by improper operation of the lump sum rules, this purpose is thwarted, leaving AFDC families destitute. *See*, p. 11, *supra*.

Therefore, the Secretary's regulation contradicts the provisions of the statute and frustrates congressional intent. Further, the regulation exceeds the Secretary's statutory authority and is arbitrary and capricious. Therefore, the regulation is not entitled to any deference whatsoever. *Securities Industry Association v. Board of Governors*, 104 S.Ct. 2979 (1984); 5 U.S.C. § 706; *see also Yuckert v. Heckler* 774 F.2d 1365 (9th Cir. 1986). Where, as in this case, the regulation is invalid, it is the intention of Congress as interpreted by the Court that must prevail. *Id.*

The Secretary attempts to set a dangerous precedent. He seeks to insure that the Court will adopt his position by issuing a regulation at the eleventh hour of this litigation by arguing that this regulation is "[a] reasonable interpretation of [the AFDC] statute. . . ." Brief for the Secretary of Health and Human Services as Respondent Supporting Petitioner at 10. This backdoor approach to law making is repugnant to the judiciary's role in statutory interpretation. As this Court accurately noted in *Securities Industry Association v. Board of Governors*:

> [D]eference is not a device that emasculates the significance of judicial review. Judicial deference to an agency interpretation of a statute "only sets the significance of judicial analysis; it does not dispell it." A reviewing court "must reject administrative construction of [a] statute, rather reached by adjudication or by rulemaking that [is] inconsistent with the statutory mandate or that frustrates the policy that congress sought to implement."

104 S.Ct. at 2983 (1984) (citations omitted).

The Secretary's self-serving interpretation of OBRA is unreasonable and clearly disregards congressional intent as well as judicial power. Therefore, the Court should not accord any deference to the Secretary's interpretation of the OBRA lump sum amendment as expressed in 45 C.F.R. § 233.20(a)(3)(ii)(F).

CONCLUSION

For the reasons stated above, the Court should affirm the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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